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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MYRON GAYLORD BRANDON,  
Petitioner,  
v.  
KENNETH QUINN,  
Respondent.

Case No. C05-5417FDB

REPORT AND  
RECOMMENDATION

**NOTED FOR:**  
**December 9<sup>th</sup>, 2005**

This 28 U.S.C. § 2254 petition for habeas corpus relief has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 (b) and local Rules MJR 3 and 4. Petitioner in this action is seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Petitioner has amended the petition to name Kenneth Quinn as the respondent. (Dkt. # 22)

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner presents the court with one claim that is without merit and two claims that are unexhausted and procedurally barred. The petition should be dismissed with prejudice.

REPORT AND RECOMMENDATION- 1

## FACTS

Petitioner challenges a 1999 conviction for robbery in the first degree. (Dkt. # 21, Exhibit 1). He was sentenced as a persistent offender to life without the possibility of parole. (Dkt. # 21, Exhibit 1). The state court of appeals summarized the facts as follows:

On May 10, 1999, Yung Park was working at a handy mart on South 112th Street in Tacoma when Brandon entered the store. According to Park, Brandon looked around him and then approached her. "His one hand was in his pocket and pointed to me, and with his left hand again pointing at me, and asked me to open the cash register drawer." 2 Report of Proceedings (RP) at 76. Park feigned that she did not understand English in hope that another customer would enter the store, but none did. "Since I didn't open the drawer right away, he looked around again with his left hand just as to hit me. So I told him 'okay,' and I opened the drawer." 2 RP at 77. After Park gave him the money, Brandon pointed under the counter and instructed her to hide under there. Park complied. Brandon then left after returning once to tell Park again to get down under the counter. Park clarified at trial that Brandon had both hands in his pockets when he first approached her, that she never saw a weapon, and that she thought he had a gun in his pocket.

After leaving the handy mart, Brandon approached Johnny Pierce and his girlfriend, who were sitting in Pierce's car about to leave from their nearby residence. Brandon explained that his mother was ill and asked if he could get a ride to her house. Pierce agreed; gave Brandon a ride; and when he returned home to find police combing the area, explained to them that he had given a ride and where. Pierce later picked Brandon out of a photomontage, though at trial he expressed reservations about his choice.

While the police were at Brandon's mother's residence, Brandon called. Using her caller ID and a reverse phone directory, the police tracked Brandon to a vacant apartment 22 blocks away. There they found Brandon's clothing but not Brandon. But the officers arrested Brandon the next morning after a citizen reported that Brandon was in an abandoned duplex in Parkland. That same day, another citizen, who lived next to the handy mart, reported finding a jacket and cap in his yard; the items matched the clothing the robber wore the previous night.

Pierce County Sheriff's Deputy Ed Knutson interviewed Brandon, part of which was tape recorded. During the taping, Brandon admitted robbing the handy mart. He claimed, however, that he did not have a gun:

Well, sir, I implied that I had a weapon, but I never had a weapon. I asked the lady to open the cash register. I took the money. Before I left, I asked the lady to lay down, and that was basically it, and I didn't mean to scare the woman. I'm sorry if I did. I didn't pull a gun, have no weapon or nothing. I really, you know, I really feel for the woman and I, you know, it hurts. It hurts. It hurts because I know better. I really know better.

2 RP at 151-52. The State also introduced a video surveillance tape of the robbery. The video is of poor quality but apparently shows that the robber placed his hand in his pocket when approaching the counter, pointing that pocket at Park. Later, he uses

1 his left hand to point at the cash register but his right hand is not visible. And later, he  
2 points with his right hand. [Court's footnote 1: The exhibit presented to this court is  
3 barely decipherable. Consequently, we derived these facts from counsel's argument at  
4 trial. After showing the videotape to the court outside the jury's presence, the  
5 prosecutor explained:

6 I would argue that when the defendant comes—when the person  
7 comes into the store, you cannot see that side of him. In fact, it  
8 doesn't appear that is arm is outstretched, which is consistent with her  
9 testimony that when he approached that his hand was in his pocket,  
10 and that he appeared to be pointing something at her. A short time  
11 later he does then reach over, but again, you can't see where his arm  
12 was beforehand because of the vantage point as well as because of the  
13 quality of the tape at that point.  
14

15 THE COURT: I agree. I'm going to deny the motion [to dismiss for  
16 insufficiency of the evidence].  
17 3RP at 191.]

18 The trial court instructed the jury on first and second degree robbery, and the  
19 jury returned a guilty verdict on the greater offense. At sentencing, the State argued  
20 that Brandon had four prior robbery convictions (two in the first degree and two in  
21 the second degree). The State presented a fingerprint expert who compared  
22 Brandon's prints with those on three of his prior judgments. [Court's footnote 2: He  
23 did not have a certified copy of Brandon's 1992 King County second degree robbery  
24 conviction to use for comparison, but he verified that the other three matched.] The  
25 court found that Brandon was a persistent offender and imposed a sentence of life  
26 without the possibility of parole.  
27

28 (Dkt. # 21, Exhibit 2).

#### PROCEDURAL HISTORY

1 Petitioner filed a direct appeal through counsel and raised the following issues.  
2

- 3 1. Whether the evidence was sufficient to establish Brandon was armed with a  
4 deadly weapon for the crime of robbery in the first degree.
- 5 2. Whether the evidence was sufficient to establish Brandon displayed what  
6 appeared to be a deadly weapon.
- 7 3. Whether the failure to enter findings of fact and conclusions of law as required  
8 by court rule prejudiced Brandon where the court's oral ruling is cursory and  
9 Brandon's statements were used against him to obtain a conviction?

10 (Dkt. # 21, Exhibit 3). Petitioner also filed a pro se brief and raised the following issues:  
11

- 12 1. Brandon's confession was not voluntary, but the product of coaching and  
13 manipulation techniques.
- 14 2. The State failed to give sufficient notice to Brandon, under both State and  
15 Federal constitutions.

3. The provisions Brandon was sentenced under calling for a preponderance of the evidence standard is unconstitutional.
4. Brandon was provided ineffective assistance of counsel, when counsel failed to call or present known witnesses or evidence that was identified as being crucial.
5. The evidence adduced at trial was insufficient to support a conviction for the charge of robbery in the first degree.

(Dkt. # 21, Exhibit 5). The state court of appeals affirmed the conviction and sentence. (Dkt. # 21, Exhibit 2). Petitioner then filed for discretionary review with the state supreme court and raised the following issues:

1. My Fifth Amendment and Fourteenth Amendment protections against self-incrimination while in custody were violated. [Confession was manipulated by detective after petitioner told detective that his attorney told him not to speak with police].
2. My Sixth Amendment jury trial and Fourteenth Amendment Due Process rights were violated by the Pierce County Prosecutor's failure to provide adequate notice of intent to seek a persistent offender determination [Includes argument that under Apprendi v. New Jersey, jury was required to find previous convictions beyond a reasonable doubt.]
3. My Sixth Amendment right to effective assistance of counsel was violated by my appointed criminal counsel. [Counsel (1) failed to argue to the court that petitioner did invoke his right to counsel and against self-incrimination; (2) failed to request a jury determine the validity of prior offenses; (3) failed to present available evidence to prove a diminished capacity defense; and (4) failed to present available witnesses to prove a diminished capacity defense.]
4. My Sixth Amendment fair trial rights and Fourteenth Amendment Due Process rights were violated at my Pierce County Superior Court trial and sentencing as the testimony and evidence were insufficient to sustain my resultant conviction and the court's sentence.

(Dkt. # 21, Exhibit 7). The state supreme court denied review without comment. (Dkt. # 21, Exhibit 8). Approximately eleven months after the state court of appeals mandate had issued, on November 13<sup>th</sup>, 2003 petitioner filed his first collateral challenge to his conviction and sentence. (Dkt. # 21, Exhibit 10). In this personal restraint petition petitioner raised the following issues:

1. Principles of due process and a right to a jury trial as outlined in New Jersey v. Apprendi. [Petitioner is claiming that the State was required to prove his prior convictions to the jury beyond a reasonable doubt.]
2. Petitioner's right to have a jury instructed to determine each element of the

1 charge beyond a reasonable doubt guaranteed under the Due Process Clause  
2 of the Fifth and Fourteenth Amendment to the United States Constitution was  
3 violated by the deficient instruction given in the case. My Sixth Amendment  
4 right to a fair trial was violated by permitting the state witness to falsely testify  
known as perjury. [Petitioner essentially arguing that there was insufficient  
evidence to find him guilty, beyond a reasonable doubt, of robbery in the first  
degree.]

5 3. My appointed trial and appellate attorneys were ineffective. This violates my  
6 Fifth, Sixth, and Fourteenth Amendment right of due process, my right to a  
7 fair trial, and effective assistance of counsel (trial and appeal of right). United  
States Constitutional Amendments Fifth, Sixth, and Fourteenth; Washington  
Constitution Article 1 §§ 3, 22.

8 (Dkt. # 21, Exhibit 10). The court denied the petition and petitioner did not seek discretionary  
9 review. (Dkt. # 21, Exhibit 13).

10 In May of 2004 petitioner filed a second personal restraint petition. The following issues  
11 were raise:

12 1. The trial attorney violated Mr. Brandon's due process rights under the  
13 Fourteenth Amendment and Article 1 § 3 of the Washington State  
14 Constitution, when she failed to request and hold an evidentiary hearing on  
aggravating facts, witnesses and a pre-sentence investigation hearing to  
demonstrate that petitioner had been treated and diagnosed with Paranoid  
Schizophrenia and Major Depression.

15 2. Ineffective Assistance of Counsel. (1) counsel failed to request a diminished  
16 capacity instruction; (2) counsel failed to point out the inconsistencies in John  
17 Pierce and Deputy Heaton's testimony regarding the location of the robbery  
18 suspect and that the clothes found did not match the description of those worn  
by the robbery suspect; (3) counsel failed to point out that the prosecutor  
knowingly presented perjury; and (4) counsel failed to point out that Ms. Park  
was unable to identify the robbery suspect.

19 3. Cumulative Error – Violation of Due Process and the Fourteenth Amendment.  
20 Based on coerced confession, inconsistencies in identification of robbery  
21 suspect's clothes and appearance and defendant's appearance on arrest,  
inconsistencies with testimony and videotape regarding placement of the  
robber's hands, prosecutorial misconduct; and judicial misconduct.

22 4. Judicial misconduct and prosecutorial misconduct deprived defendant of a fair  
23 trial.

24 (Dkt. # 21, Exhibit 14). The petition was dismissed as time barred pursuant to RCW 10.79.090.

25 (Dkt. # 21, Exhibit 16). Petitioner did not seek discretionary review.

26 Petitioner filed his first federal habeas petition on October 19<sup>th</sup>, 2004. (Dkt. # 21, Exhibit  
27 17). It was not clear at that time if petitioner could return to state court on unexhausted claims and

1 the petition was dismissed without prejudice. (04-Cv-5617KLS Dkt. # 49).

2 Mr. Brandon has other personal restraint petition currently pending, but in light of the ruling  
3 that he is time barred in state court those petitions will not be addressed.

4 Mr. Brandon filed this petition raising the following issues:

5 1. The Persistent Offender Accountability Act (POAA) is unconstitutional  
6 because it permits the sentencing judge to make findings regarding the  
underlying facts of prior convictions based on a preponderance of the  
evidence.

7 2. Insufficiency of the evidence.

8 (Dkt. # 7). Respondents counsel notes that in a “memorandum of law in support of the habeas  
9 corpus petition” filed on October 3<sup>rd</sup> 2005 petition raises a third claim:

10 11 3. Application of the POAA to petitioner’s conviction violates the Ex  
Post Facto clause.

12 (Dkt. # 19). The court did not call for additional briefing and petitioner’s memorandum (Dkt. # 19)  
13 is not properly before the court. However, since the respondent has addressed the third issue in  
14 responsive briefing the court will consider this issue.

#### EVIDENTIARY HEARING

16 If a habeas applicant has failed to develop the factual basis for a claim in state court, an  
17 evidentiary hearing may not be held unless (A) the claim relies on (1) a new rule of constitutional  
18 law, made retroactive to cases on collateral review by the Supreme Court that was previously  
19 unavailable, or (2) a factual predicate that could not have been previously discovered through the  
20 exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by  
21 clear and convincing evidence that but for constitutional error, no reasonable fact finder would have  
22 found the applicant guilty of the underlying offense. 28 U.S.C. §2254(e)(2) (1996). Petitioner's  
23 claims rely on established rules of constitutional law. Further, petitioner has not set forth any factual  
24 basis for his claims that could not have been previously discovered by due diligence. Finally, the  
25 facts underlying petitioner's claims are insufficient to establish that no rational fact finder would have  
26 found him guilty of the crime. Therefore, petitioner is not entitled to an evidentiary hearing.

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28 REPORT AND RECOMMENDATION- 6

## STANDARD

2 Federal courts may intervene in the state judicial process only to correct wrongs of a  
3 constitutional dimension. Engle v. Isaac, 456 U.S. 107 (1983). Section 2254 is explicit in that a  
4 federal court may entertain an application for writ of habeas corpus “only on the ground that [the  
5 petitioner] is in custody in violation of the constitution or law or treaties of the United States.” 28  
6 U.S.C. § 2254(a)(1995). The Supreme Court has stated many times that federal habeas corpus relief  
7 does not lie for errors of state law. Lewis v. Jeffers, 497 U.S. 764 (1990); Pulley v. Harris, 465 U.S.  
8 37, 41 (1984); Estelle v. McGuire, 502 U.S. 62 (1991).

9        Further, a habeas corpus petition shall not be granted with respect to any claim adjudicated  
10      on the merits in the state courts unless the adjudication either (1) resulted in a decision that was  
11      contrary to, or involved an unreasonable application of, clearly established federal law, as determined  
12      by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination  
13      of the facts in light of the evidence presented to the state courts. 28 U.S.C. §2254(d). A  
14      determination of a factual issue by a state court shall be presumed correct, and the applicant has the  
15      burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C.  
16      §2254(e)(1).

## DISCUSSION

## Exhaustion of State Remedies.

19 In order to satisfy the exhaustion requirement, petitioner's claims must have been fairly  
20 presented to the state's highest court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.  
21 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985). Petitioner's second claim was presented to the state  
22 court of appeals as a state claim and did not notify the court the claim relied on a right secured by the  
23 Untied States Constitution. (Dkt. # 21, Exhibits 3 and 5). The claim was presented to the state's  
24 highest court in the context of a petition for review which was denied without comment.  
25 Respondent notes “[r]aising the issue for the first time in the Washington Supreme Court is  
26 insufficient to fully and fairly exhaust the factual issue and legal claim. Castille v. Peoples, 489 U.S.  
27 346, 351 (1989)( raising a claim in a procedural context in which its merits are unlikely to be  
28

1 considered constitutes a lack of fair presentation)”. The court agrees with this analysis and believes  
2 this issue to be unexhausted and procedurally barred. The issue will be addressed in the alternative  
3 later in this Report and Recommendation. Petitioner’s third issue, regarding the Ex Post Facto  
4 application of the Persistent Offender Accountability Act, was raised in the “memorandum of law in  
5 support of the habeas corpus petition.” This issue was never submitted in state court and is clearly  
6 unexhausted and procedurally barred.

7 Procedural Bar.

8 Normally, a federal court faced with an unexhausted petition dismisses the petition without  
9 prejudice, so that the petitioner has an opportunity to exhaust the claims in state court. Here,  
10 however, petitioner is barred from filing in state court as any attempt to file another petition will be  
11 deemed successive and time barred. See, RCW 10.73.090 and 10.73.140.

12 Federal Courts generally honor state procedural bars unless it would result in a “fundamental  
13 miscarriage of justice” or petitioner demonstrates cause and prejudice. Coleman v. Thompson, 501  
14 U.S. 722, 750 (1991). Petitioner here cannot show cause and prejudice in state court.

15 To show cause in federal court, petitioner must show that some objective factor external to  
16 the defense prevented petitioner from complying with state procedural rules relating to the  
17 presentation of his claims. McCleskey v. Zant, 499 U.S. 467, 493-94 (1991). Here, petitioner has  
18 filed multiple challenges and the time allowed for such filings has simply expired. Petitioner cannot  
19 show cause that excuses his procedural default in state court.

20 On the merits.

21 1. Apprendi.

22 Petitioner’s first issue, that the Persistent Offender Accountability Act (POAA) is  
23 unconstitutional because it permits the sentencing judge to make findings regarding the underlying  
24 facts of prior convictions based on a preponderance of the evidence is exhausted and will be  
25 considered.

26 The state courts denial of this claim was not contrary to clearly established federal law. The  
27 court of appeals stated:

1 Brandon next argues that the State was required to notify him in the criminal  
 2 information that he faced life in prison as a persistent offender and that it needed to  
 3 prove his prior convictions to the jury beyond a reasonable doubt. He reasons that  
 4 any fact that increases his punishment must be charged in the indictment and proven  
 5 at trial, citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L. Ed. 2d  
 6 435 (2000).

7 But our Supreme Court rejected these arguments in *State v. Thorne*, 129  
 8 Wn2d 736, 921 P.2d 514 (1996). It held that the State need not plead the defendant's  
 9 prior convictions in the information that results in a life sentence. Instead, all the  
 10 constitution and former RCW 9.94A.120(4) require is a sentencing hearing where a  
 11 trial judge decides by a preponderance of the evidence whether the prior convictions  
 12 exist. Former RCW 9.94A.110(1) (2000); *Thorne*, 129 Wn 2d at 782.

13 (Dkt. # 21, Exhibit 2, page 7 and 8). The court went on to note that the state had presented  
 14 "conclusive evidence" of three prior convictions and persuasive evidence of a fourth and all four  
 15 convictions qualified as "most serious" for sentencing purposes. (Dkt. # 21, Exhibit 2 page 8).  
 16 Petitioner was sentenced in April of 2000. Apprendi, which forms the basis for this claim, was  
 17 decided in June of 2000. Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi does not apply  
 18 retroactively. Rees v. Hill, 286 F.3rd 1103 (9<sup>th</sup> Cir. 2002). This issue is without merit.

19 2. Sufficiency of the evidence.

20 While the court has found this issue to be unexhausted and procedurally barred, it will also  
 21 address the issue on the merits. The state court noted:

22 On May 10, 1999, Yung Park was working at a handy mart on South 112<sup>th</sup>  
 23 Street in Tacoma when Brandon entered the store. According to Park, Brandon  
 24 looked around him and then approached her. "His one hand was in his pocket and  
 25 pointed to me, and with his left hand again pointing at me, and asked me to open the  
 26 cash register drawer." 2 Report of Proceedings (RP) at 76. Park feigned that she did  
 27 not understand English in hope that another customer would enter the store, but none  
 28 did. "Since I didn't open the drawer right away, he looked around again with his left  
 hand just as to hit me. So I told him 'okay,' and I opened the drawer." 2 RP at 77.  
 After Park gave him the money, Brandon pointed under the counter and instructed  
 her to hide under there. Park complied. Brandon then left after returning once to tell  
 Park again to get down under the counter. Park clarified at trial that Brandon had  
 both hands in his pockets when he first approached her, that she never saw a weapon,  
 and that she thought he had a gun in his pocket.

29 (Dkt. # 21, Exhibit 2). When petitioner was interviewed by Pierce County Sheriff's Deputy Ed  
 30 Knutson he stated "Well, sir, I implied that I had a weapon, but I never had a weapon." (Dkt. # 21,  
 31 Exhibit 2). Finally the video tape of the incident showed petitioner placing his hand in his pocket  
 32 approaching the victim and pointing his pocket at her as if he has a gun. (Dkt. # 21, Exhibit 2).

1 The state court held:

2 RCW 9A.56.200 defines first degree robbery:

- 3 1. A person is guilty of robbery in the first degree  
if in the commission of a robbery or of  
immediate flight therefrom, he;  
4 (a) Is armed with a deadly weapon; or  
5 (b) Displays what appears to be a firearm or other  
deadly weapon; or  
(c) Inflicts bodily injury.

6 Here the only question is whether the evidence satisfied section (1)(b). This  
7 same question arose in *State v. Barker*, 103 Wn. App. 893, 14 P.3d 38  
(2000)(sufficient evidence where defendant said he would shoot store clerk and he  
8 pressed an object in her back), *review denied*, 143 Wn. 2d 1021 (2001); *State v.*  
9 *Kennard*, 101 Wn App. 533, 2 P.3d 38 (sufficient evidence where defendant  
demanded money, stated he had a gun, patted his pocket, and told teller he knew  
where she lived), *review denied*, 142 Wn. 2d 1011 (2000); and *State v. Henderson*,  
10 34 Wn App. 865, 664 P.2d 1291 (1983)(sufficient evidence where defendant had  
right hand concealed in pocket when demanding money).

11 (Dkt. # 21, Exhibit 2, pages 4 and5).

12 Evidence is sufficient to support a criminal conviction if the record reasonably supports a  
13 finding of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 320 (1979). The  
14 question is whether, after reviewing the evidence in the light most favorable to the prosecution, any  
15 rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.  
16 *Id.*, *citing Johnson v. Louisiana*, 406 U.S. 356, 362 (1972). The state courts' finding of sufficient  
17 evidence in this case is based on petitioners placing his hand in his pocket and pointing the pocket at  
18 the victim while demanding she open the cash register. (Dkt. # 21, Exhibit 2). Petitioner admitted  
19 his physical actions implied he had a gun. The evidence was sufficient and the state court finding is  
20 not contrary to clearly established federal law. This issue is without merit.

21 CONCLUSION

22 Based on the foregoing discussion, the Court should **DISMISS** the petition **WITH**  
23 **PREJUDICE**. A proposed order accompanies this report and recommendation.

24 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
25 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.  
26 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of

1 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule  
2 72(b), the clerk is directed to set the matter for consideration on **December 9<sup>th</sup>, 2005** as noted in the  
3 caption.

4 DATED this 16<sup>th</sup> day of November, 2005.

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10 Karen L. Strombom  
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12 United States Magistrate Judge  
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